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February 2, 1998

Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

RE: CS Docket No. 97-248, RM No. 9097

Dear Madam Secretary:

Enclosed for filing in the above referenced docket, please find an original and eleven copies of the Joint Comments of Consumer Satellite Systems, Inc., American Programming Services, Inc.; Satellite Receivers, Ltd.; Programmers Clearing House, Inc.; and Satellite Distributors Cooperative, Inc.

A copy of these comments have been provided to Deborah Klein at the Cable Services Bureau and to International Transcription Services. Please distribute 1 copy to each Commissioner.

Thank you for your attention in this matter.

Sincerely,



Mark C. Ellison

cc: Deborah Klein

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

RECEIVED

FEB - 2 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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| In the Matter of: |) | |
| |) | |
| Implementation of the Cable |) | CS Docket No. 97-248 |
| Television Consumer Protection |) | |
| and Competition Act of 1992 |) | RM No. 9097 |
| |) | |
| Petition for Rulemaking of |) | |
| Ameritech New Media, Inc. |) | |
| Regarding Development of Competition |) | |
| and Diversity in Video Programming |) | |
| Distribution and Carriage |) | |

JOINT COMMENTS OF

**AMERICAN PROGRAMMING SERVICE, INC.;
CONSUMER SATELLITE SYSTEMS, INC.;
PROGRAMMERS CLEARING HOUSE, INC.;
SATELLITE RECEIVERS, LTD.; and
SATELLITE DISTRIBUTORS COOPERATIVE**

I. INTRODUCTION

The following comments are submitted in this proceeding in support of the request of Ameritech New Media, Inc. ("Ameritech") for certain amendments and revisions to the Commission's rules pertaining to program access and price discrimination as set forth in 47

C.F.R. §76.1000 - 1004 (the “rules”) under section 628 of the Communications Act of 1934, as amended (the “Act”). These comments are jointly filed on behalf of American Programming Service, Inc.; Consumer Satellite Systems, Inc.; Programmers Clearing House, Inc.; and Satellite Receivers, Ltd. (collectively referred to herein as the “Distributors”). Additionally, comments are filed here with respect to issues pertaining to buying group matters on behalf of the Satellite Distributors Cooperative (“SDC”) a buying group formed, in part, by the Distributors to acquire programming distribution rights.

The Distributors are independent packagers/distributors of satellite delivered television programming. They market such programming on a retail basis to individual home satellite dish consumers (commonly referred to as “HSD” subscribers) using C-band satellite systems and on a wholesale basis through HSD satellite system retailers. All of the Distributors have been engaged in the business of distributing and selling of satellite programming since the mid-1980’s, when programmers first began scrambling their services. As satellite television receive-only satellite programming distributors, they are, by the definition specified in 47 C.F.R. 76.1000(e), multichannel video programming distributors (“MVPDs”).

The Distributors serve, in total, more than 500,000 C-band satellite households - approximately 25% of the total C-band HSD market.¹ They operate on a national level, competing with cable operators, DBS system providers and other technologies in virtually every American market.

¹ As reported in *Satellite Business News*, January 14, 1998, there are 2,113,993 authorized C-band HSD subscribers.

At the time programmers began scrambling and selling their services to the HSD market, the Distributors initially experienced great difficulties in acquiring programming distribution rights and when they were offered distribution rights such rights were at wholesale prices substantially higher than the rates paid by cable operators. Today, the cases of denial of program access are far less common. Virtually all satellite delivered programming is available to the Distributors. However, significant problems remain with the wholesale pricing of programming in the HSD market. Accordingly, the Act and rules are of no less importance today than they were when first enacted.

Rarely are the Distributors afforded the opportunity to purchase programming at wholesale rates comparable to those enjoyed by cable or other distribution technologies. Frequently, the rates that are offered to the Distributors for the HSD market are double or triple the rates paid by even the smallest cable systems -- and even though the Distributor may have well in excess of 100,000 subscribers. If the Commission were to examine the market by gathering all of the rate cards and actual rates of programming suppliers it would find that substantial disparities continue to exist between the rates paid by the Distributors for HSD distribution and the rates paid by other distribution technologies. It is imperative, therefore, that an adequate and effective mechanism exists within the Commission to address such discriminatory pricing.

The Distributors are grateful to the Commission for its consideration and concern regarding the matter of program access and price discrimination and for its issuance of this important rulemaking. As will be seen in these comments, the Distributors have been

extremely frustrated in their attempts to utilize the Act and the rules to satisfy price discrimination claims. In this pleading, we point to a price discrimination proceeding which was filed by several of the Distributors on February 1, 1996, and which has not, as of this date, been resolved.² While the comments here are critical of the Commission for its handling of that pending case, we are aware of the difficult task load the Cable Services Bureau has faced over the past two years and recognize that its failure to resolve the Distributors' pending complaint may be due to numerous factors beyond the control of the staff or the parties. Nevertheless, we believe the Commission can look to the Distributors' pending complaint as a case-in-point reflecting the shortcomings of the current complaint processing system. The Distributors' pending case, referred to herein as the "CNN Case", provides ample evidence of the need for procedural and substantive reforms. It may well serve, in fact, as the poster child of the need for such reform.

II. SUMMARY

A. **Time Limits.** Time limits for disposition of price discrimination and program access complaints are essential. As noted above, three of the four Distributors submitting these Comments have consolidated price discrimination complainants pending at the Commission which were filed more than two years ago and which remain unresolved. While these Comments do not fully endorse the specific time frames proposed by Ameritech, it is

² In the Matter of Consumer Satellite Systems, Inc., et al. vs. Cable News Network, Inc., et al., Docket Nos. CSR 4685, 4686, 4687 and 4706. These cases were subsequently consolidated. The Distributors involved as Complainants in that proceeding are CSS, PCH, and SRL. Additionally, Turner Vision, Inc., another HSD packager, is a party in the consolidated action.

clear that a refined process and more defined time limits on the processing of complaints are greatly needed.

In order to speed the process of complaint resolution, the Distributors urge: (a) strict limits on the number of pleadings; (b) the establishment of a mandatory first status conference within 45 days following the filing of the Reply; and (c) the establishment of a statutory time period following the mandatory first status conference for the issuance of the staff's findings.

B. **Discovery.** Clearly defined rights of discovery must be established. Program access and price discrimination complaints are, in essence, no different than other forms of litigation and it is essential that parties to such actions have the ability to fully prosecute and defend the complaints. That ability does not currently exist under the rules.

Additionally, it appears that those C-band HSD distributors which are vertically integrated with programmers and cable operators may be purchasing programming at wholesale prices significantly below the rates paid by non-vertically integrated distributors. In the absence of adequate discovery rights, such activities can not be addressed.

C. **Damages.** The nature and scope of remedies for violations of program access and price discrimination rules must be made clear. Under the existing rules, parties committing such violations have little or no incentive to resolve complaints as they see no risk in resisting for as long as possible. The Commission must establish clear guidelines for the award of compensatory and, where justified, punitive damages for violations of the rules. Congress has clearly granted the authority to the Commission impose such remedies.

D. **Buying Group Issues.** SDC is a buying group formed by the Distributors and other C-band HSD distributors. SDC supports the position of Small Cable Business Association (“SCBA”). Programmers should not be permitted to refuse to deal with a buying group on the basis of the buying group’s members’ refusal to accept joint and several liability. Other means are available to ensure payment of pro rata fees.

III. COMMENTS

A. **Time Limits.** The Commission has asked for comments pertaining to the need for the imposition of time limits and has stated that the average time for disposition of a program access case is 8.1 months. Apparently then, the Distributors’ CNN Case is an aberration. The Distributors filed their price discrimination complaints against CNN on February 1, 1996. The last submissions in the CNN case (i.e., responses to the Commission’s interrogatories) were filed on or about May 9, 1997. There have been no pleadings, no motions, and no status conferences or other actions in the case since that time. Hence, two years and one day have passed since those complaints were filed; eight months have passed since the last materials were filed in the case and, as of this date, no decision has been rendered.

The Distributors can not address the merits or provide details of the CNN Case here. However, the Distributors do not believe that the issues, facts or evidence presented in the case merit a period of more than two years to complete the case. Further, the delay is not attributable to any action, or lack thereof, on the part of the parties. The Distributors are perplexed and greatly disappointed by the delay in the resolution of their complaint. And, as

addressed below, their concerns are exacerbated by the lack of certainty that they will be made financially whole for the period during which the Case has been pending.

The CNN Case clearly points up the need for time constraints for the processing of program access and price discrimination complaints. However, the time constraints suggested by Ameritech may not be realistic in all cases. We do not agree with Ameritech's proposal to shorten the time for answer (30 days to 20 days) and reply (20 days to 15 days). We do not believe that the existing time frames for the filing of those pleadings are at the root of any excessively long processing periods.

It has been the Distributors' experience that the answer and reply can be complex (particularly in price discrimination cases) and are of critical importance to both sides in a program access case. Unlike a civil lawsuit where the complaint and answer can be "bare-bones" and often merely establish the basic elements of claims and defenses to be later proven at trial, in the case of program access/price discrimination actions the pleadings are at the heart of the case and form the basis for the Commission's decision. For this reason, the Distributors do not encourage a shortening of the time for the basic pleadings. Additionally, the parties should be free to consent to reasonable extensions for the filing of pleadings.

There are, however, steps the Commission should take with respect to pleadings:

1. Strictly Enforce Limits on the Number of Pleadings. Under 47 C.F.R. § 76.1003(b) of the rules, pleadings are limited to the complaint, answer, and reply plus additional written submissions such as briefs and written interrogatories. The rules further provide under subsection (f) of that section that, "Except as provided in this section, or upon

a showing of extraordinary circumstances, additional motions or pleadings by any party will not be accepted.”

It has been the experience of the Distributors that the prohibition on additional pleadings is not closely observed. In the CNN Case, the Commission staff accepted fourth and fifth pleadings. Following the Complainants’ Reply, the Defendants filed a “Response to the Reply” which was received and considered by Commission staff over the objection of the Complainants. Commission staff advised, during a status conference to discuss the Complainant’s objection to such filing, that the Response to the Reply had been already been read and considered. That necessitated the filing of a “Reply to the Response to the Reply” by the Complainants. Fortunately, the staff then advised that no additional pleadings would be accepted.

Such supplemental only pleadings serve to prolong the process. The rule limiting pleadings to complaint, answer and reply should be strictly enforced by the Commission; no additional pleadings should be permitted except in the most extraordinary situations or in the conduct of discovery. Strictly enforcing the limits on pleadings would greatly reduce the length of time needed to complete a case.

2. Establish a Firm Time for the Initial Status Conference. The rules provide that the Commission staff may, in its discretion, direct the attorneys and/or the parties to appear for a status conference.³ We suggest that the rules be amended to provide for a mandatory status conference within 45 days of the filing of the Reply. Having such a mandatory status conference would serve several purposes. First, it would compel the staff to

³ 47 C.F.R. § 76.1003(j).

promptly commence review and consideration of the pleadings. Second, it would help to stimulate settlement discussions. Third, it would help both the staff and the parties to understand the scope of the case and to determine early in the proceeding whether briefs would be necessary and the scope of discovery. Generally, it would provide the parties with a much clearer sense of the time frames involved. Compelling an early status conference would, in our view, do more to speed up resolution of proceedings than any other steps the Commission might take.

3. Establish a Time Limit From the Date of the First Status Conference to Complete the Processing of the Case. We suggest that the appropriate time to start the running of the clock for completion of the complaint process would be the mandatory first status conference as discussed above. It is our belief that a set period of time commencing on that date would permit adequate discovery, briefing, as necessary, and preparation of an order. We believe that 150 days for price discrimination cases (which in nearly all cases should involve discovery) and 90 days for simple program access cases from the date of such status conference would be adequate for completion of the case.

B. **Discovery.** The Distributors support Ameritech's position with respect to discovery: it is an essential element in the prosecution of a program access/price discrimination case. Only through a significant level of discovery can a complainant and the Commission staff fully evaluate the defenses and justifications asserted by a defendant. It is recognized that unlimited and unrestricted discovery could potentially slow the complaint

process and potentially increase costs for all involved parties. However, placing the decision as to what and how much discovery is to occur solely within the discretion of Commission staff may not provide for adequate production of pertinent information.

In the CNN Case, Commission staff determined that production of documents was not needed and requested the parties to submit proposed interrogatories. Complainants and Defendant prepared extensive interrogatories, exchanged those interrogatories with one another, dealt with objections, and then submitted the agreed upon interrogatories to the Commission staff. The Complainants submitted 13 pages of suggested interrogatories and the Defendant submitted 10 pages of suggested interrogatories. Subsequently, despite the parties' submission of such interrogatories, the staff's discovery consisted of a one and one-half page letter (the same letter to both sides) that propounded only one interrogatory to the Defendant and two interrogatories to the Complainants. No other discovery was permitted.

Additionally, in their original complaints, the Complainants asked the Commission to compel the Defendant to produce rate cards for all of the competitive technologies. That request was never granted and the only rate card placed in exhibit in the case was the CNN cable rate card originally submitted by the Complainants.

Hence, in the CNN Case, which is, according to Commission staff, the first price discrimination case to have proceeded through the entire process and one which involved fairly complex economic issues, there was virtually no discovery conducted.

Rules must be established that permit a substantial degree of discovery. The Commission staff should accommodate all necessary and reasonable discovery requests. We believe that the staff can review such requests and eliminate those that are beyond the scope

of the proceeding and those which are not essential to proof of the case. Protective orders can be issued to ensure confidentiality. However, Commission staff should not be permitted to reject discovery requests without reasonable justification.

We further agree that the process of discovery would be enhanced by the inclusion of discovery requests in the program access complaints, but having such a procedure should not preclude later discovery as needed.

We also support the position of the Wireless Cable Association (“WCA”) as stated in paragraph 11 of the NPRM. It is essential that alternative MVPDs have the opportunity to access documents that may demonstrate that a program access violation has occurred. Generally, a programmer’s published cable rates can be found through various industry publications. However, the actual rates, terms, and conditions offered to any specific cable operator would be available only through discovery. Similarly, rates offered to DBS providers and competing C-band HSD distributors are not publicly available and would be legitimately available only through discovery.

A situation in the market that exemplifies the need for open discovery relates to one of the biggest problems faced by the Distributors as independent operators: competition in the HSD market from distributors/packagegers that are vertically integrated with programmers and cable operators. The Distributors estimate that cable-owned HSD packagegers now control some 70% of the subscriber base in the HSD market. (Hence, the market of the once sole competitor to cable, HSD, is now, in effect, controlled by cable.) The Distributors are deeply concerned that some of those vertically integrated packagegers may be acquiring programming rates that are unavailable to independent distributors. It is evident from published

advertisements in satellite guides and elsewhere that such cable-owned packagers are able to offer programming packages at *retail* prices that are lower than the *wholesale* costs incurred by the Distributors. Based on the Distributors' knowledge of the market and available HSD rates, they feel certain that volume discounts or other operating efficiencies alone are not sufficient to explain how the vertically integrated HSD packagers can offer programming at such reduced rates. As discussed below, broader discovery rights are needed to permit the Distributors to address this significant competitive problem.

The lack of clear procedures and rights with respect to discovery greatly undermines the effectiveness of Section 628 and the Commission's rules. The Distributors can see in the marketplace the obvious differentials between their own retail offerings and those of the vertically integrated HSD packagers, and yet are uncertain that they can do anything about such disparities under the rules because of their inability to discover the terms underlying the transactions between the HSD packagers and their affiliated programming suppliers.

It is the Distributor's belief that means must be established whereby either the Commission would collect and examine actual programming rates offered in the market or, alternatively, where competing MVPDs could, upon an initial showing of good cause, undertake preliminary discovery to determine whether price discrimination was occurring. In the case of the C-band market, the Distributors can see what appears to be the result of discriminatory wholesale pricing, but are impaired in their ability to prove that such activities are taking place due to the absence of clearly defined discovery rights.

C. **Damages.** The Distributors are in full support of and concurrence with the position of Ameritech on the issue of damages. We firmly believe that the Commission has

the necessary authority under Section 628(e)(1) to award damages whenever appropriate. The Commission is urged to restate its position with respect to damages and make it clear that programmers that deny access, engage in unlawful price discrimination, or otherwise violate the Commissions program access rules will be subject to damages.

Certainly, in cases of price discrimination there should be no question that an aggrieved party is entitled to recover, at a minimum, the difference between the rate paid by the complaining party and rate paid by the competing MVPD except to the extent that there is proven justification for such differential. Damages should accrue from the date of delivery of the notice of intent to file a complaint as required under 47 C.F.R. §76.1003(a).

The authority of the Commission to assess damages in cases brought under section 628 is abundantly clear. The Act, at section 628(e)(1) provides:

(1) *Remedies Authorized.* - Upon completion of such adjudicatory proceeding, the Commission shall have the power to order appropriate remedies, including, if necessary, the power to establish prices, terms, and conditions of sale of programming to the aggrieved multichannel video programming distributor.

(2) *Additional Remedies.* - The remedies provided in paragraph (1) are in addition to and not in lieu of the remedies available under title V or any other provision of this Act.

Similarly, with respect to program access/price discrimination cases, the House Conference Report states:

The FCC shall provide for an expedited review of complaints made pursuant to this section and shall order appropriate remedies.⁴

Nothing in the Act or the legislative history supports those who contend either that remedies under Title V are exclusive or that the Commission lacks authority to impose damages. In fact, quite the opposite is true. There is nothing ambiguous about the Act or the

⁴ House Conference Report, Report 102-862, September 14, 1992, page 93.

intent of Congress in this regard: *the Commission has been granted carte blanche in its ability to award damages*. The Commission's previous decision regarding damages is contrary to legislative intent and counterproductive in achieving the ends Congress sought when passing section 628.

By making it quite clear that programmers will be subject to such damages, the Commission would send a message to the industry that discrimination will not be tolerated and that programmers will, in fact, be penalized if they fail to abide by the rules. Only by removing the profit from price discrimination will the Commission be able to promote fair pricing and competition and finally bring an end to the discriminatory practices that have been engaged in for more than a decade. This is a step which must be taken and taken immediately.

D. **Buying Group Issues.** The Satellite Distributors Cooperative is a relatively new entity that has been formed to act as a programming buying group for the Distributors and other independent HSD distributors. While it has had some initial success in securing programming contracts, SDC is concerned that further efforts to obtain group volume deals will be thwarted by programmers insisting on joint and several liability.

SDC agrees with the proposal of SCBA that any cooperative buying group that maintains adequate financial reserves should not be required to provide joint and several liability. SDC further urges that program providers not be permitted to refuse to deal with a buying group provided that the members of the group each guarantees to the program provider its individual, pro rata share of programming license fees. SDC has, to date, been successful in gaining arrangements under such terms of individual responsibility. Such

method of ensuring responsibility for payment of fees is no different than the programming vendors would be dealing with if contracting with the distributors on an individual basis and does not create any undue burden or risk. Hence, the Commission should make it clear that a programming vendor may not refuse to deal with a buying group so long as each individual member of the group guarantees to the programming vendor its pro rata share of programming fees.

IV. CONCLUSION

The Distributors believed that with the passage of the Act and the Commission's rules for program access complaint procedures they would soon begin to receive fair and equitable pricing and be placed in a position where they could compete with other distribution technologies. Today, they are disillusioned and dismayed. Price discrimination in the HSD market remains nearly as common and acute as it was when the Act first passed and HSD distributors find themselves without the prompt and adequate remedy they had anticipated. They are deeply concerned about their ability to compete not only against those other distribution technologies which enjoy better rates for programming, but also against HSD packagers which are either directly owned by or closely integrated with cable operators and programmers.

An efficient and functional system that provides prompt resolution of disputes, permits reasonably broad discovery, and ensures certain and adequate damages is essential if the independent HSD distributors are to survive and compete effectively. Without such a system, the discrimination will continue unabated and the domination of the market by cable

and cable-owned HSD packagers will rapidly expand. The Commission is urged to act expeditiously to revise the rules and its operating procedures to ensure that the C-band HSD market remains an effective and viable competitor.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. C. Ellison', written over a horizontal line.

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February 2, 1998